

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

**AARON K. RILEY,**

**Petitioner,**

**v.**

**Civil action no. 2:06cv119  
Criminal action no. 2:04CR11  
(Judge Maxwell)**

**UNITED STATES OF AMERICA,**

**Respondent.**

**REPORT AND RECOMMENDATION**

On December 6, 2006, the *pro se* petitioner, at inmate at USP Allenwood, filed a Motion Under 28 U.S.C. §2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody. This matter is pending before me for initial review and report and recommendation pursuant to LR PL 83.15.

On May 23, 2006, following a jury trial, the petitioner was found guilty of counts 2-6 of an indictment that was returned on April 20, 2004. On November 16, 2006, the Court sentenced the petitioner to 33 months imprisonment. Subsequently, on November 20, 2006, the petitioner filed a notice of appeal.

The petitioner's §2255 motion is premature because his appeal is pending before the Fourth Circuit Court of Appeals. See Walker v. Connor, 2003 WL 21660483 (4th Cir. 2003). Thus, the undersigned recommends that the petitioner's Motion to Vacate under 28 U.S.C. §

2255 (Doc. 102) be **DENIED AND DISMISSED WITHOUT PREJUDICE**<sup>1</sup> and that his Motion to Withdraw (Doc. 110) be **GRANTED**.

Any party may file within ten (10) days after the receipt of this Recommendation with the Clerk of the Court written objections identifying the portions of the Recommendation to which objections are made, and the basis for such objections. A copy of such objections should also be submitted to the Honorable Robert E. Maxwell, United States District Judge. Failure to timely file objections to the Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Recommendation.<sup>2</sup>

The Clerk of Court is directed to mail a copy of this Recommendation to the *pro se* petitioner.

Dated: January 22, 2007

/s/ *John S. Kaull*

JOHN S. KAULL  
UNITED STATES MAGISTRATE JUDGE

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<sup>1</sup>The petitioner, in fact, filed a Motion to Withdraw his § 2255 on January 18, 2005 so that his direct appeal could proceed.

<sup>2</sup> 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. ), cert. denied, 467 U.S. 1208 (1984).